

HANDOUT: KEY RESTITUTION CASES
CATHARINE GOODWIN, MAY 2011, SAN DIEGO

■ Restitution update 2011:

Importance of objection at sentencing.

When a defendant objects to the restitution at sentencing, there is a much more favorable standard of review on appeal for the defendant: Cf. related cases of U.S. v. Innarelli, 524 F.3d 286, 293 (1st Cir. 2008) (remand), and U.S. v. Matos, 611 F.3d 31 (1st Cir. 2010) (no remand).

Pre-MVRA authority for MVRA procedures.

In addressing older, pre-MVRA cases, courts find pre-MVRA authority for non-substantive changes to a payment order, and for entering a delayed restitution order: U.S. v. Kyles, 601 F.3d 78 (2d Cir. 2010).

Authorization of CVRA v. MVRA:

Slightly different in restitution authorization (In re McNulty, 597 F.3d 344 (6th Cir. 2010); virtually identical (In re Doe, 264 Fed.Appx. 260, 262 n.2 (4th Cir. 2007) and U.S. v. Speakman, 594 F.3d 1165, 1171 n.3 (10th Cir. 2010) and U.S. v. Atlantic States Cast Iron Pipe Co., 612 F.Supp.2d 453 (D.N.J. 2009). But no resulting difference in analysis and results, so far.

CVRA mandamus petitions:

- a) Circuit split continues on the standard of review: 6th Cir uses high standard to deny petitions (In re Acker, 596 F.3d 370 (6th Cir. 2010) and In re McNulty, 597 F.3d 344 (6th Cir. 2010)) and to grant petition (In re Simons, 567 F.3d 800, 801 (6th Cir. 2010)); DC Cir adopts high standard in partially granting petition (U.S. v. Monzel, ___ F.3d ___, 2011 WL 1466365 (D.C. Cir. 2011)).
- b) District court's 3-month lag in ruling on victim's motion can amount to denial of victim's rights and granting of petition: In re Simons, 567 F.3d 800, 801 (6th Cir. 2010).
- c) Victims may not file direct appeal: U.S. v. Aguirre-Gonzalez, 597 F.3d 46 (1st Cir. 2010); U.S. v. Monzel, ___ F.3d ___, 2011 WL 1466365 (D.C. Cir. 2011); and U.S. v. Amy Unknown, ___ F.3d ___, 2011 @L 988882 (5th Cir. 2011).
- d) Victims taking active role in case by asking for publication of decision and defending conviction and restitution order in opposition to defendant's post-sentencing § 2255 motion: U.S. v. Simons, 567 F.3d 800, 801 (6th Cir. 2010).

Offset for value of defendant's services:

No - where services require license (U.S. v. Hunter, 618 F.3d 1062, 1065 (9th Cir. 2010) and U.S. v. Dokich, 614 F.3d 314, 321 (7th Cir. 2010)); Yes - where services do not require license (U.S. v. Vaghela, 169 F.3d 729, 736 (11th Cir. 1999)); see generally: (U.S. v. Huff, 609 F.3d 1240 (11th Cir. 2010)).

Co-conspirator v. victim dichotomy:

Yes, where victim not involved in OC but was complicit with D in other activity (U.S. v. Sanga, 967 F.3d 1332 (9th Cir. 1992); No, where victim complicit with D in OC, but victimized by D in related activity (U.S. v. Lazarenko, 624 F.3d 1247, 1251 (9th Cir. 2010)).

Payment schedule hair-splitting continues:

7th Cir. Continues to be most reasonable: U.S. v. Dokich, 614 F.3d 314 (7th Cir. 2010); U.S. v. Sawyer, 521 F.3d 792 (7th Cir. 2008).

Futility of requiring payments for incarceration period: Court remanded after 7 years of changing schedules during incarceration for minor error in characterizing BOP's IFRP: U.S. v. Kyles, 601 F.3d 378 (2d Cir. 2010) (remand after 17 yrs of orders during D's incarceration).

■ **Foreseeable harms:**

Police vehicle damaged in chase following robbery: U.S. v. Washington, 434 F.3d 1265, 1266 (11th Cir. 2006); U.S. v. Donaby, 349 F.3d 1046 (7th Cir. 2003); sheriff's deputy injured in getaway (but not for psychological costs for uninjured bank personnel): U.S. v. Reichow, 416 F.3d 802 (8th Cir. 2005); bystander shot by police officer: U.S. v. Metzger, 233 F.3d 1226, 1227 (10th Cir. 2000); customer of bank robbery: U.S. v. Moore, 178 F.3d 994 (8th Cir. 1999); investigative and clean up costs from Clean Air Act offense: U.S. v. Phillips, 367 F.3d 846 (9th Cir. 2004).

Victim's attorneys fees: U.S. v. Cummings, 281 F.3d 1046 (9th Cir. 2002) (fees of mother of kidnaped children in related civil proceeding); U.S. v. de George, 380 F.3d 1203 (9th Cir. 2004) (fees of victim defending against civil suit brought by defendant); U.S. v. Morgan, 376 F.3d 1002 (9th Cir. 2004) (bank's interest and finance charges part of R but not part of relevant conduct).

■ **Classic statement of proximate cause criteria:**

Palsgraf v. Long Island RR Co., 248 N.Y. 339, 162 N.E. 99 (1928).

■ **Pre-MVRA causation:**

U.S. v. Vaknin, 112 F.3d 579 (1st Cir. 1997) (requires something more than just "but for").

■ Who is a restitution victim of the offense?

NO: person killed by unlawfully sold handgun: *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); person killed as consequence of drug dealing & RICO: *U.S. v. Rendon-Galvis*, 564 F.3d 170 (2d Cir. 2009); girlfriend of drug purchaser: *U.S. v. Sharp*, 463 F.Supp.2d 556 (E.D.Va. 2006); person killed by gun possessed unlawfully: *U.S. v. McArthur*, 108 F.3d 1350 (11th Cir. 1997).

YES: customers, bystanders, and damaged police vehicles injured in bank robbery and getaways: see “foreseeable” cases, above; investors in scheme who were themselves defrauded by the scheme leader, but who did not participate with the leader in the scheme: *U.S. v. Ojeikere*, 545 F.3d 220, 223 (2d Cir. 2008).

■ Restitution only compensable for actual loss:

Can only be based on actual loss: *U.S. v. Reynolds*, 432 F.3d 821 (8th Cir. 2005); cannot be based on defendant’s gain: *U.S. v. George*, 403 F.3d 470, 474 (7th Cir. 2005), *U. S. v. Galloway*, 509 F.3d 1246, 1254 (10th Cir. 2007); cannot be based on arbitrary calculation: *U.S. v. Laney*, 189 F.3d 954, 967 n. 14 (9th Cir 1999); cannot be based on speculation or general market harm: *U.S. v. Chalupnik*, 514 F.3d 748, 755 (8th Cir. 2008), *U.S. v. Dove*, 585 F.Supp.2d 865, 872 (W.D.Va. 2008); can require even more precision than GL loss: *U.S. v. Parker*, 553 F.3d 1309, 1323-24 (10th Cir. 2009); cannot be based on generalized societal or market harm: *U.S. v. Caputo*, 517 F.3d 935 (7th Cir. 2008), *U.S. v. Behrman*, 235 F.3d 1049 (7th Cir. 2000), *U.S. v. Chalupnik*, 514 F.3d 748 (8th Cir. 2008); cannot be based on acts outside the OC absent a conspiracy or scheme: *U.S. v. Maturin*, 488 F.3d 657 (5th Cir. 2007); cannot be imposed for civil kinds of damages: *U.S. v. Scott*, 405 F.3d 615 (7th Cir. 2007).

■ Victims’ participation expenses

Listed in statute; not required to meet causation criteria: *U.S. v. Amato*, 540 F.3d 153 (2d Cir. 2008).

■ Legislative changes

Lists and discusses several suggestions: *U.s. v. Solsbury*, 727 F.Supp.2d. 789, 796-97 (D.N.D. 2010); cites also *U.S. v. Paroline*, 672 F.Supp.2d 781, 793 n. 12 (E.D.Tx. 2009) (the underlying case in the 5th Cir. *In re Amy*, and *In re Amy Unknown*, cases).

■ Court must be able to “estimate ... with some reasonable certainty” the loss resulting from the defendant’s conduct:

For restitution, the court must be “able to estimate, based upon facts in the record, the amount of the victim’ loss with some reasonable certainty.” *U.S. v. Pearson*, 570 F.3d 480, 486 (2d Cir.

2009), citing *U.S. v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007); see also *U.S. v. Danser*, 270 F.3d 451, 455-56 (7th Cir. 2001) and *U.S. v. Julian*, 242 F.3d 1245, 1248 (10th Cir. 2001).

Although mathematical precision is not required, there must be evidence upon which the court could reasonably calculate the measure of harm caused to the victim by the defendant's conduct. Courts finding such evidence in the child porn cases to be lacking include: *U.S. v. Chow*, ___ F.Supp.2d ___ (S.D.N.Y.), 2010 WL 4508794 (denying restitution); see also *U.S. v. Church*, 701 F.Supp.2d 814 (W.D.Va. 2010) (imposing \$100 in nominal restitution).

■ Proximate cause in § 2259

Finding proximate cause is required under § 2259: *US v. Monzel*, -- F.3d --, 2011 WL 1466365 (D.C. Cir. 2011); *US v. McDaniel*, 631 F.3d 1204, 1208–09 (11th Cir. 2011); *In re Amy*, 591 F.3d 792 (5th Cir. 2009) (overruled on reh'g); *US v. Wright*, -- F.3d --, 2011 WL 1490763 (5th Cir. 2011) (Davis, J., dissenting); Gov't concession in *In re Amy Unknown*, ___ F.3d ___, 2011 WL 988882 (5th Cir. 2011). Finding no proximate cause required: *In re Amy Unknown*, -- F.3d --, 2011 WL 988882 (5th Cir. 2011).

■ Limited restitution for acts of others:

Absent co-conspirators' knowledge of each others' acts in hub and spoke conspiracy, restitution only authorized for defendant's acts: *U.S. v. Huff*, 609 F.3d 1240, 1244-45 (11th Cir. 2010).

■ Appellate court (possession of) child pornography cases:

U.S. v. McDaniel, 631 F.3d 1204 (11th Cir. 2011) (Jan. 28, 2011), requires proximate cause; upholds \$12,700 restitution on clear error review (defendant did not object below).

In re Amy Unknown, ___ F.3d ___, 2011 WL 988882 (5th Cir. (Tex.) March 22, 2011), grants CVRA petition (denied 18 mo. earlier in *In re Amy*, 591 F.3d 792 (5th Cir. 2009)); uses high mandamus standard; 2259 d/n require proximate cause; jt/sev shifts burden to defendant to recover civilly from others; remands for restitution determination; pending.

U.S. v. Monzel, ___ F.3d ___, 2011 WL 1466365 (D.C. Cir.) (April 19, 2011); uses high mandamus standard; proximate cause required; granting CVRA petition, but denying victim's direct appeal attempt; loss cannot be proportioned across all defendants; remands for limited determination of loss caused by defendant. Possibly more accurate name: "In re Vicky, the Victim in the Misty Child Pornography Series"); remand pending.

U.S. v. Baxter, 2010 WL 3452537 (9th Cir. (Mont.)), upholds \$3,000 restitution for 18 sessions of counseling as defendant's apportioned share of the harm; limited causation analysis; cites foreseeable harm and Ferber.